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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1181

316 US # 25
ROY-SC R

ROYAL INSURANCE COMPANY, LTD. (a Corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Royal Insurance Company, Ltd., a corporation, respectfully shows:

This is the third petition for a writ of certiorari in this cause. Each of the prior petitions[1] was denied

[1]October Term 1937, No. 806; October Term 1940, No. 307.

without comment; neither, however, sought to review a final determination of the cause by the Circuit Court of Appeals. The case has now been tried for the third time in the District Court which (for the third consecutive time) entered judgment for petitioner; the Court of Appeals (in its fourth decision herein) reversed the judgment and remanded the cause with directions to enter final judgment for respondent (R. 237).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is an action at law upon a valued policy of leasehold insurance, written on the California standard form of fire insurance policy, and covering—

> "$15,000.00—On assured's Leasehold Interest in property located on the Beach Road on the westerly shore of Belvedere Cove, . . . being a two-story, frame-stucco, hard roofed dwelling house.
>
> This insurance is predicated upon lease to land above described held by the assured from the Trustees of the City of Belvedere, California, to which there is paid a monthly rental of three dollars ($3.00)." (R 3)

The litigation revolves about two inquiries:

> (1) "This suit . . . is on a valued policy of fire insurance upon [respondent's] 'leasehold interest' in certain property . . . The prior appeals were concerned with the question whether [respondent] had . . . proved an insurable interest of a kind described in his policy . . . On the

last appeal we held that [respondent] had established his case in that respect . . ."

Opinion, Circuit Court of Appeals, on last (fourth) appeal herein (R 232).

(2) "The issue presented on the [affirmative defenses] . . . is as follows: where a plaintiff, seeking an insurance policy, represents to defendant insurer that the leasehold to be insured is one for a term running until the destruction of his property, but actually it is a month-to-month tenancy; and the insurance contract is entered into upon the mutual assumption that the leasehold is of the nature represented by plaintiff, is defendant liable on the contract?

Opinion, District Court, on last (third) trial herein (R 25, 26).

JURISDICTION.

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code (U.S. Code, Title 28, Section 347), and Rule 38 of the Revised Rules of the Supreme Court.

The judgment of the Circuit Court of Appeals was filed and entered January 23, 1942 (R 238), reversing judgment of the District Court in favor of petitioner and ordering final judgment for respondent. Petition for rehearing was seasonably filed and was denied without opinion March 11, 1942 (R 239). Issuance of mandate has been stayed to April 30, 1942, and thereafter until disposition of this petition (R 239; and Order dated April 10, 1942).

QUESTIONS PRESENTED.

I. Must not the language of a contract of insurance be given the meaning that common speech imports, rather than a technical legal definition?

(The policy terms "lease" and "leasehold" in a policy of leasehold insurance do not comprehend a month-to-month tenancy.)

II. What is the test to be applied on appeal to determine whether findings of fact made by a trial Court are "clearly erroneous" within the meaning of Rule 52(a) FRCP?

REASONS FOR GRANTING WRIT.

I.

1. CONSTRUCTION OF THE CONTRACT BY THE CIRCUIT COURT OF APPEALS.

The meaning of the words "lease" and "leasehold" as used in the insuring clause of the policy was established as the law of the case[2] by the third opinion of the Court of Appeals (SR 366, 371-3; 111 F2 667, 670-1; 130 ALR 812, 816-7):

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[2]The Court of Appeals made this clear in its last (fourth) opinion herein (R 232):

> "The prior appeals were concerned with the question whether appellant [respondent herein] had alleged and proved an insurable interest of a kind described in his policy, namely, an estate in the nature of a leasehold. On the last appeal we held that appellant had established his case in that respect, but that the insurer [petitioner] should be given an opportunity to set up such affirmative defenses as might be available to it. The present appeal relates to the proof of these defenses."

"A tenancy at will may arise as a result of the taking of possession of land by permission . . . without any understanding as to the duration of the possession; and this tenancy may, by reason of the reservation or payment of rent, be changed into a periodic tenancy . . . *Here, through the monthly payment and acceptance of rent, a month-to-month tenancy existed* . . .

Notwithstanding lack of proof of a formal lease, we think it must be held that the policy properly described [respondent's] estate as a lease or a leasehold interest.[3] *The definition of these terms appears to embrace, in effect, any agreement, whether express or implied, which gives rise to the relationship of landlord and tenant.*" (Emphasis ours.)

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2. AN IMPORTANT QUESTION OF GENERAL LAW IS INVOLVED.

Leasehold insurance is an important and rapidly growing branch of the insurance business. In a leasehold insurance policy the words "lease" and "leasehold" are of primary significance. The construction of these words presents a question of general public interest, and one of real concern to the insuring public and insurance companies alike. It is a question which has not been but should be settled by this

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[3]It should be emphasized (—the evidence being wholly without conflict on this point) that at no time prior to issuance of the policy or prior to the fire did the parties have any discussion whatever concerning a month-to-month tenancy. The only tenure talked about was a tenure commensurate with the life of the improvements; that is, tenure for a term running at all events until destruction of the building.

Court, especially since it is one of first impression so far as we are aware.[4]

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3. THE DECISION IS IN CONFLICT WITH GENERAL INSURANCE LAW.

Insurance contracts, like other contracts, are to be taken and understood in their plain, ordinary, and popular sense.

> *Imperial Fire Ins. Co. v. Coos County,* 151 US 452, 14 SCt 379, 38 LEd 231;
>
> *Aschenbrenner v. United States Fidelity & G. Co.,* 292 US 80, 54 SCt 590, 78 LEd 1137.

The words "lease" and "leasehold" have a well understood meaning in ordinary, popular, and daily usage. They mean that there is in existence between lessor and lessee a definite arrangement as to the duration of the tenure for a fixed or determinate period known as the term. They are not commonly used to refer to a tenancy at will or a tenancy from month-to-month. Indeed, the primary thought embodied in their usage is the reference to *something more* than a tenancy at will or from month-to-month.

This meaning has been universally recognized by lexicographers and courts, and has been universally

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[4]This (third) opinion of the Court of Appeals is reported in 130 ALR 812, annotated on the question—"What amounts to a leasehold interest within insurance policy". The annotator says (p. 818):

> "No cases other than *Smith v. Royal Ins. Co.* (CCA 9th) (reported herewith) ante, 812, involving the question under annotation, have been found."

distinguished by them from the technical definition of these words taken from the law of landlord and tenant.

In choosing the latter meaning and rejecting the former, the Court of Appeals committed serious error. It has decided an important question of local law in a way probably in conflict with applicable local statutes and decisions.

California Civil Code, Section 1644:

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning . . ."

Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P 273, 275-6;

Bastian v. British Amer. Assur. Co., 143 Cal. 287, 77 P 63, 64.

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4. **THIS COURT HAS GRANTED CERTIORARI IN LIKE CASES.**

Aschenbrenner v. United States Fidelity & G. Co., 292 US 80, 54 SCt 590, 78 LEd 1137.

In that case the Supreme Court granted certiorari and reversed a judgment of the Ninth Circuit Court of Appeals for the identical error in construing a policy of insurance which that Court has, we respectfully submit, repeated in the case at bar.

"The only question which it is necessary to decide here is whether the insured was a 'passenger' at the time of the accident within the meaning of the policy. The Court of Appeals ruled that

he was not; it reached this conclusion by applying the term as it was said to be defined in the law of common carriers." (292 US, 82-3; 78 LEd, 1139)

II.

1. BLANKET REJECTION OF TRIAL COURT'S FINDINGS OF FACT.

The trial Court made detailed findings of fact on the affirmative defenses of misrepresentation, mutual assumption proving false, and rescission (Findings VII-IX; R 38-40). These are well summarized in the memorandum opinion of the District Court (R 25, 27-9):

> "The testimony of plaintiff's [respondent's] insurance broker shows that he believed, and so represented to defendant [petitioner], that the interest upon which he was seeking insurance was one which would last until the property should be destroyed by fire or by other cause (Tr. 24-5, 29; 319, 331[5]). This testimony is confirmed by defendant's insurance agent who prepared the policy in question (Tr. 34, 35, 40, 45[6]), and who was led to believe that plaintiff's tenure was that which plaintiff's broker represented it to be (Tr. 47-8[7]) . . . But instead of possessing an interest terminable only upon the destruction of the premises, plaintiff had a month-to-month tenancy . . . Defendant's expert witnesses have testified that no reputable fire insurance company, acting in the

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[5]R 148-9, 154; SR 319, 331.
[6]R 90, 92, 98, 105.
[7]R 108.

usual course of business, would knowingly issue a leasehold policy on such a tenure (Tr. 21, 26, 28[8]). Thus, the evidence shows that defendant, relying upon a material misrepresentation by plaintiff, prepared a policy which it does not issue in the course of its business, and which it has constantly sought to rescind. . .

. . . The record is clear that plaintiff's broker misrepresented the extent of the leasehold interest upon which defendant issued the policy. Since the representations related to the subject of insurance itself, there is no doubt as to their materiality (Citations).

By reason of the misrepresentations made by plaintiff's broker, both parties were misled into drawing up the instrument which is the subject matter of this action. They assumed something to be so which was not so, namely, that plaintiff had a leasehold interest in a Belvedere estate terminable only upon the destruction of the property . . .

The record supports the affirmative defenses of (1) misrepresentation of a material fact, which led to the making of the contract upon which plaintiff relies, and (2) mutual assumption proving false . . .

It is ordered that judgment be entered in favor of defendant, upon repayment to plaintiff of the insurance premiums, plus interest, as offered . . ."

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[8]R 73 (answering question at R 66), 79, 82-3. This expert testimony is without conflict in the record.

a. Rejection of finding of reliance upon the representation.

The opinion of the Court of Appeals states the basis for the rejection of this finding[9] (R 232, 233):

> ". . . [Petitioner], so it says, was given to understand that [respondent] had an interest which 'ran until the property was destroyed'. It would not, it claims, have insured the risk otherwise. Yet in drafting the policy it consciously chose not to describe the interest in the terms represented . . . Presumably the Royal Insurance Company is an experienced and careful underwriter. If it had received positive assurance that [respondent's] interest ran for the life of his building it is incredible that the company would deliberately have omitted so to characterize the interest in the insurance contract."

In short, rejection of the finding is rested solely upon a factual inference drawn by the Court of Appeals from a single fact in the case: *The policy did not embody the representation as an express warranty; hence, the insurer could not have relied on it.*

If valid, this reasoning would demolish the defense of misrepresentation in every suit on every insurance policy as a matter of law, because the underwriter ("presumably . . . experienced and careful") omitted to specify in the policy itself that the representation

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[9]The trial Court found (VII; R 38-9)—

> "that defendant issued the said policy in reliance upon the truth of said statements [regarding tenure] and each of them . . .; that defendant would not have issued the said or any policy of insurance to plaintiff had it been informed of the true facts regarding plaintiff's tenure . . ."

must be true. It must follow that the reasoning is not valid.[10]

Moreover, the Court of Appeals simply ignored the evidence. Petitioner's witness Evans testified without qualification and without contradiction that he and petitioner relied on Hanley's (respondent's broker) statements regarding respondent's tenure (R 102-3); and that such reliance without independent investigation by petitioner was in accordance with the usual practice and custom of petitioner (R 102). Three expert witnesses testified without contradiction that this practice accorded with the usual custom of the fire insurance business (R 73-5; 80; 83).

Hanley himself, testifying for respondent, said:

> "Q. There isn't any doubt . . . that you and Mr. Evans worked on the assumption that there was a lease in effect . . . which entitled Keil [respondent's original predecessor in interest] and his successors to a tenancy of that property as long as the building remained standing? A. That is right." (R 148)
>
> "Q. And you worked on the assumption that there was a lease between the Belvedere Land Company [the town's grantor] and Smith's [respondent's] predecessors in interest? A. That is correct; . . . in other words, the company would not have issued the policy, or Matt Evans would not have approved of the policy unless we thought there was a lease."

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[10]The California standard form fire policy used here provides (SR 36):

> "This entire policy shall be void . . . if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof . . ."

Finally, three expert witnesses testified without contradiction that no reputable fire insurance company, acting reasonably and naturally in the usual course of the fire insurance business, would have accepted a risk for a leasehold policy if it knew that the interest to be insured was merely a month-to-month tenancy (R 73, 79, 83). This evidence established the materiality of the representation.[11] And the fact of reliance is reasonably inferrable from the fact of materiality.

It is submitted that the Court of Appeals exceeded its appropriate appellate function in substituting its own factual inference (however permissible that inference may have been as a matter of abstract logic) for the equally permissible inference of the trial Court, especially since the former inference is precisely at variance with *all* of the testimony directly relevant to the issue. (Rule 52(a), FRCP)

b. Rejection of finding that respondent did misrepresent his tenure.

To reach the conclusion that this finding[12] was "clearly erroneous", the Court of Appeals was forced to eliminate from consideration the testimony of petitioner's witness Evans. This it did by characterizing

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[11]29 *Am. Jur.* 424; Insurance, Section 525;
California etc. Ins. Co. v. Feinstein, 15 Cal. (2d) 413, 101 P2 696, 701-2.

[12]The trial Court found (VII; R 38):
"Plaintiff stated to defendant that he held a lease to the land on which stood the building described in said policy; that said lease was for a term running to, and not expiring until, the destruction of said building by fire or other casualty."

his testimony as "so vague and equivocal as to render (it) worthless" (R 234). Admittedly, as the opinion points out in a footnote (n. 4, R 234), Evans testified that respondent's broker told petitioner "that this lease ran until the property was destroyed"; and that Evans "several times testified positively that he was told that Mr. Smith (respondent) had a lease".

The trial Court had an opportunity to judge of the credibility of witness Evans; the appellate Court did not. The trial Court accepted Evans' testimony; the appellate Court, we submit, was not empowered to summarily erase it from the record. (Rule 52(a), FRCP)

Moreover, the finding that the representation as to tenure was in fact made does not rest wholly (or even principally) on the testimony of Evans, despite the strong intimation to the contrary in the opinion.[13] Respondent's broker, by whom the policy was procured, testified as a witness for respondent (SR 331-2):

> "Q. It is a fact, is it not, that the lease you and Mr. Evans were talking about was a lease which ran until the building was destroyed; is that not correct? A. That would be correct . . .
>
> Q. . . . Did you or did you not tell Mr. Evans that Mr. Smith had a lease to the property? A. I told Mr. Evans that Mr. Smith had a lease to the property through his predecessors,

[13] "To prove the making of the representation [petitioner] called its agency superintendent [Evans], who had been solicited to procure the writing of the policy." Opinion, Court of Appeals (R 234)
The opinion does not refer to any other testimony on this point.

through Bland, through Keil and to himself . . . I made the statement to Mr. Evans that Mr. Smith had a lease from the Town of Belvedere, through his predecessors in interest, Mrs. Bland and Mr. Keil . . .

Q. You did tell Mr. Evans, didn't you, that Mr. Smith held a tenancy of the property as long as his building remained on the property? A. That is correct."

Since no other witnesses than Evans and Hanley (the broker) testified to the transactions leading to issuance of the policy, Hanley's testimony must be the "countervailing proof" referred to in the opinion of the Court of Appeals (R 235). The trial Court, who heard the testimony in open court, certainly did not construe the testimony of Hanley as "countervailing proof" to that of Evans.[14] But if we assume that Hanley and Evans gave contrary testimony on this point, there would still be but a conflict in the testimony.

The resolution of this conflict was for the trial Court, and not for the Court of Appeals. (Rule 52(a), FRCP)

c. Rejection of finding of falsity of the representation.

The Court of Appeals rejects the finding (VI, R 36; VII, R 38-9; VIII, R 39) that at all times respondent

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[14] "The testimony of [respondent's] insurance broker shows that he believed, and so represented to [petitioner], that the interest upon which he was seeking insurance was one which would last until the property should be destroyed by fire . . . This testimony is confirmed by [Evans] . . ." Opinion, District Court (R 27).

occupied the property as a month-to-month tenant, and that therefore the representation that respondent had a tenure commensurate with the life of the building was false.

The basis for this rejection is that "the record affords no satisfactory answer" as to what tenure respondent had,[15] and since the burden of proving the representation false rested on petitioner the doubt should have been resolved against it (R 236-7).

The record is remarkably full and complete on the nature and extent of respondent's tenure, covering the entire period from 1890 to 1932. It includes all recorded documents; all pertinent minutes and official records of the town back to 1897 when it acquired the property; all pertinent books and records of the town's grantor back to 1890, when the house was built by respondent's first predecessor in interest; all available tax bills of both town and county, certified copies

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[15]The opinion intimates (R 237) that respondent may have had more than a month-to-month tenancy by virtue of an estoppel of the town based upon its "complacent attitude".

But it is undisputed that the town did not own this property in its corporate capacity; the property had been acquired and was held exclusively for the use of the public. (See the first opinion of the Court of Appeals herein, 77 F2 157, analyzing the provisions of the 1896 deed by which the town acquired the property.)

The law is well settled that tenure by estoppel may not be acquired in property so held.

Simons Brick Co. v. Los Angeles, 182 Cal. 230, 187 P 1066, 1068-9;

La Societa, etc. v. San Francisco, 131 Cal. 169, 63 P 174;

Snyder v. Mt. Pulaski, 176 Ill. 397, 44 LRA 407.

of assessment rolls of the town, and the testimony of the town assessor.[16]

In addition, the record contains direct declarations by two of respondent's predecessors in interest which, in themselves, are sufficient to support the finding that respondent was no more than a month-to-month tenant.[17]

(a) Respondent called Mrs. Preusser as a witness on tenure. On cross-examination she admitted authorship of the following letter (SR 159-60):

> "Legally this home is personal property; because when it was first placed on the beach, my uncle, Mr. Hugo D. Keil, who built the original part of it . . . made a verbal agreement . . . that if they would allow him to build on the beach, he would waive all Squatter's rights and agree to remove the house at any time on demand; and therefore, the house . . . must be classified as personal property. As such it should be appraised . . . at a nominal figure, taking into consideration that the agreement to remove might be enforced at any time . . ."

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[16]By California law all leasehold interests are assessable as personal property. Where leased land is owned by a municipal corporation, it is mandatory that the value of the leasehold be assessed to the lessee and a tax thereon paid by him.

Hammond Lumber Co. v. Los Angeles, 104 Cal. App. 235, 285 P 896, 898.

No such assessment was ever made to, nor tax paid by, respondent or any of his predecessors in interest.

[17]*California Code of Civil Procedure,* Section 1849:

> "Where . . . one derives title to real property from another, the declaration . . . of the latter, while holding the title, in relation to the property, is evidence against the former."

(b) Respondent's immediate predecessor in interest was the Crocker First Federal Trust Company, acting as executor and testamentary trustee with reference to this property. Petitioner introduced in evidence (SR 348-9) the federal estate tax return prepared and executed by the Trust Company. This states as "Nil" the value of "any and all interest that (testatrix) has or could have in and to the real property whereon" the house in question was located.

As a matter of fact, neither the District Court nor the Court of Appeals have had the slightest trouble in ascertaining the nature and extent of respondent's tenure from the evidence in the case, up to the time of the last (fourth) appeal. On the first trial herein the District Court found that respondent had a month-to-month tenancy.[18] On the first appeal, this finding was approved.[19] On the second trial the finding of the District Court was the same.[20] On the third appeal,[21] the Court of Appeals reviewed the evidence on tenure and concluded (SR 372)—

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[18]"It is true that [respondent's] tenancy was legally subject to termination by . . . the town on thirty days' written notice . . . Doubtless the town had the power to demand the removal of [respondent's] structures upon legal notice . . . He had a right of possession . . . until the expiration of the period after legal notice to terminate the tenancy." Opinion, District Court, 5 FS 435, 438.

[19]"Without question the intention appears that the rents should not be paid any longer than the town should permit the occupants to remain upon the land . . . No scintilla of evidence . . . gave indication of the existence of any express agreement of lease to [respondent] or any of his predecessors." Opinion, Court of Appeals, 77 F2 157, 158.

[20]Memorandum opinion of the District Court (SR 60); and Findings (SR 79).

[21]The second appeal (93 F2 143) involved only matters of pleading.

> "Here, through the monthly payment and acceptance of rent, a month-to-month tenancy existed."

These repeated decisions must establish beyond all doubt that the evidence on tenure (all of which is a part of the record on this appeal) reasonably justifies an inference that respondent did *not* have what he represented, namely, tenure for the life of his improvements. The validity of this factual inference, *qua* inference, cannot be affected by the question of which party has the burden of proof.

To establish that respondent did *not* have a tenure for the life of the building is to prove a negative proposition which, obviously, must rest on inference. The only way to prove what respondent did *not* have in the way of tenure, is to offer such a complete and detailed picture of the factual circumstances under which he and his predecessors acquired and held the property that from them the trier of facts would be led to infer the negative proposition.[22] This, petitioner did.

The Court of Appeals says that a finding based upon documentary evidence "does not command the strong presumption of verity which usually attends a finding" (R 237). Had the appellate Court inferred from the evidence that the representation of a tenure

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[22]On the other hand, respondent's rebuttal offers no such difficulty. His proposition is affirmative, and his relation to the property such as to make the true facts more readily accessible. (*United States v. Denver & R. G. R. Co.*, 191 US 84, 91-2, 24 SCt 33, 48 LEd 106, 109.)

for life of the improvements was true instead of false, it might have been acting within accepted limitations of review.[23]

But the opinion does not suggest that the evidence would support such an inference. To the contrary, it says in effect (R 237) that the appellate Court is unable to determine from the record whether the trial Court was right or wrong in its finding that the representation was false.

In rejecting the finding on this basis, we submit that the Court of Appeals clearly exceeded its powers of review under Rule 52(a), and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

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2. THE STATUS ON APPEAL OF FINDINGS OF FACT IS AN UNSETTLED QUESTION.

Rule 52(a) FRCP, that findings of fact "shall not be set aside unless clearly erroneous . . .", has not been interpreted by the Supreme Court. The Courts of

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[23]But, see 3 *Ohlinger's Federal Practice* 658 (Rule 52, Note 2.1.4):

> "The rule . . . that a reviewing court cannot give to a finding based on exhibits 'the weight that attaches to a finding of fact where the court has heard witnesses in open court, but must draw its own deductions and conclusions from an examination of the exhibits', and the rule . . . that there is no presumption in favor of the correctness of a conclusion from admitted facts, are definitely superseded [by Rule 52(a), FRCP]."

Appeals of the several Circuits have been and are now at variance on the proper interpretation.[24]

A majority of the Circuits have ruled that a finding supported by substantial evidence cannot be said to be "clearly erroneous".

Corbett v. Halliwell (CCA 2) 123 F2 331;
Plack v. Baumer (CCA 3) 121 F2 676, 678;
Keystone etc. Lines v. Brannon-Signaigo C. Co. (CCA 5) 115 F2 736, 739;
Andrew Jergens Co. v. Conner (CCA 6) 125 F2 686, 689;
Apex Elec. Mfg. Co. v. Maytag Co. (CCA 7) 122 F2 182, 189;
E. Albrecht & Son v. Landy (CCA 8) 114 F2 202, 205;
Dye v. United States (CCA 10) 123 F2 385, 386.

On the other hand, the First Circuit interprets the Rule differently.

Fleming v. Palmer (CCA 1) 123 F2 749, 751:

"A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence."

United States v. State Street Trust Co. (CCA 1) 124 F2 948, 950.

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[24] 2 *Fed. Rules Service* 672 (Commentary, "Scope of Review of Findings"):

"The decisions under Rule 52 follow no definite trend."

And, as to possible ambiguity in the Rule, see
Ilsen & Hone, 24 Minn. Law Rev. 1, 2 Fed. Rules Service 720, 736-7.

And the instant decision of the Ninth Circuit is the result, in effect, of a trial *de novo* on appeal. The Court of Appeals has here indulged in a complete reweighing of the evidence; has rejected the conclusions reached by the trial Court on the credibility of witnesses, on the resolution of evidentiary conflicts, and on the factual inferences to be drawn from documentary evidence.[25] This practice is wholly out of harmony with the great weight of federal authority, and with the spirit (if not the letter) of Rule 52(a).

Wherefore, it is respectfully urged that this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit be granted.

Dated, San Francisco, California,
April 24, 1942.

ROYAL INSURANCE COMPANY, LTD.,
Petitioner,

By PERCY V. LONG,
Attorney for Petitioner.

LONG & LEVIT,
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[25]This is not the first time that the Ninth Circuit Court of Appeals has so interpreted the scope of review under Rule 52(a). Haney, J., stated in a concurring opinion in *Occidental Life Ins. Co. v. Thomas* (CCA 9) 107 F2 876, 879:

"I believe that the conclusion of the majority is reached by weighing the evidence, and doubt that we have any such power . . ."

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